

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 20-0029

KEITH EDGAR

Claimant-Petitioner

V.

SENESCO MARINE, LLC

and

THE BEACON MUTUAL INSURANCE
COMPANY

DATE ISSUED: 02/28/2020

Employer/Carrier- Respondents

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Respondent

DECISION and ORDER

Appeal of the Order Denying Claimant's Motion for Summary Decision and Dismissing Case of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (The Law Office of Scott Roberts, LLC), Groton, Connecticut, for claimant.

James T. Hornstein (Higgins, Cavanagh & Cooney), Providence, Rhode Island, for employer/carrier.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Claimant's Motion for Summary Decision and Dismissing Case (2019-LHC-00998) of Administrative Law Judge Jerry R. DeMaio rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sought disability benefits under the Act for hearing loss and bilateral hand and arm injuries. The parties entered into a Section 8(i), 33 U.S.C. §908(i), settlement agreement to resolve claimant's claims. On August 31, 2018, the district director filed and served the order approving the parties' settlement agreement. On September 10, 2018, claimant's counsel received on behalf of claimant the settlement checks issued by employer. Claimant subsequently sought a 20 percent assessment pursuant to Section 14(f), 33 U.S.C. §914(f), asserting employer's payment was untimely. After the district director issued a recommendation that employer's payment was timely and that no additional compensation was due, the case was referred to the Office of Administrative Law Judges (OALJ).

Claimant filed a motion for summary decision, alleging there were no facts in dispute and that he was entitled to a Section 14(f) assessment as a matter of law. The administrative law judge denied the motion and dismissed claimant's claim, finding the ten-day period for paying compensation expired on Monday, September 10, 2018, the date payment was made. Accordingly, the administrative law judge determined employer's payment was not late and he denied claimant's motion for summary decision and dismissed the claim as a matter of law. Order at 2 – 3.

On appeal, claimant challenges the administrative law judge's dismissal of his claim. Employer responds, urging affirmance of the decision. The Director, Office of Workers' Compensation Programs (the Director), has filed a response also urging affirmance.

Claimant contends the administrative law judge erred in relying on the Office of Workers' Compensation Programs (OWCP) Procedure Manual to determine that the ten-day period for timely paying compensation ended on Monday, September 10, 2018. We reject claimant's contention and affirm the dismissal of his claim.

Section 14(f) of the Act states:

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation....

33 U.S.C. §914(f). In this case, compensation became "due" on August 31, 2018, the date the district director filed the compensation order approving the settlement. *See, e.g., Carillo v. Louisiana Ins. Guaranty Ass'n*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009). Citing the OWCP Procedure Manual, the administrative law judge determined it is immaterial whether August 31, 2018, is counted in the ten-day period or whether the first day was September 1, 2018, because employer's payment was timely under either scenario. Order at 2. If the period commenced August 31, 2018, the tenth day was Sunday, September 9, 2019. Consequently, payment on the next business day was timely. If the ten-day period commenced September 1, 2018, employer's payment on September 10 was on the tenth day, and thus timely. *Id.* at 2 – 3. The administrative law judge therefore denied a Section 14(f) assessment.

Claimant cites no authority to support his contention that the "counting provision" of the OWCP Procedure Manual is legally erroneous. The Procedure Manual states:

Determining the end of the ten day period is straight forward. If the decision is filed on April 30, benefits must be paid on or before May 10. If May 10 is not a business day, payment is due on the first business day thereafter.

Procedure Manual at 8-0203, §8(a) (emphasis in original).¹ This statement is consistent with case precedent holding that Section 14(f) requires payment by the tenth calendar day after the compensation becomes due, unless the tenth day falls on a holiday or weekend (*see infra*). *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998); *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT),

¹ <https://www.dol.gov/owcp/dlhwclsproman/proman.htm#08-0203> (accessed Feb. 13, 2020).

reh'g denied, 128 F.3d 801 (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994); *Reid v. Universal Maritime Service Corp.*, 41 F.3d 200, 28 BRBS 118(CRT) (4th Cir. 1994);² *see also Irwin v. Navy Resale Exch.*, 29 BRBS 77 (1995). Indeed, at Chapter 8-0203 §8(b), the Procedure Manual references this law for cases arising in jurisdictions other than the Fifth Circuit.³ Moreover, we note that a calendar day counting method is congruent with current federal rules of procedure as well as regulations governing practice before the OALJ and the Board. *See* Fed. R. Civ. P. 6(a)(1)(A), (B) (“exclude the day of the event that triggers the period” and “count every day” including weekends and holidays); 29 C.F.R. §18.32(a)(1)(i) (same); 20 C.F.R. §802.221(a) (“the day from which the designated period of time begins to run shall not be included”); *see also* Fed. R. App. P. 26(a)(1)(A). Thus, the tenth day was September 10, and employer’s payment on that day was timely.

Additionally, the Procedure Manual addresses the situation that would have arisen had the ten-day period ended on Sunday, September 9, 2018:

In the event that the ten day period expires on a Saturday, Sunday, or a legal holiday, the business day immediately following shall be considered the last day of the ten day period.

Procedural Manual, Ch. 8-0203 §3(b). This statement is also consistent with federal and program-specific practice. *See* Fed. R. Civ. P. 6(a)(1)(C); Fed. R. App. P. 26(a)(1)(C); 29 C.F.R. §18.32(a)(1)(iii); 20 C.F.R. §802.221(a). Thus, employer’s payment on September 10 was timely in this respect also.

² These decisions rejected the applicability to Section 14(f) of the prior version of the Federal Rule of Civil Procedure 6(a), under which intermediate weekends and holidays were not counted in time periods of fewer than 11 days. *See* Fed. R. Civ. P. 6(a) (2007).

³ The Fifth Circuit held in *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43(CRT), *aff’d on reh’g*, 918 F.2d 33, 24 BRBS 55(CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991), that Rule 6(a) applied, such that intermediate Saturdays, Sundays and holidays were excluded from the ten-day period in Section 14(f). The Fifth Circuit has not addressed this issue since Rule 6(a) was amended in 2009 to state that, “When the period is stated in days or a longer unit of time . . . count every day, including intermediate Saturdays, Sundays, and legal holidays.” Fed. R. Civ. P. 6(a) (2016). The rationale for the Court’s holding in *Quave* would appear to require application of the present version of Rule 6(a) to cases arising after the rule was amended. Regardless, employer’s payment was timely.

Claimant has failed to demonstrate error in the administrative law judge's conclusions that employer's payment of compensation was timely made on September 10, 2018, and that he is not entitled to a Section 14(f) assessment as a matter of law.

Accordingly, we affirm the administrative law judge's Order Denying Claimant's Motion for Summary Decision and Dismissing Case.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge